Supreme Court, U.S.
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In The
Supreme Court of the United States

**RAMONA S. BURNETTE,**

*Petitioner,*

v.

**SIGNET/CAPITAL ONE BANK,**

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# Petition for Writ of Certiorari

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## QUESTION PRESENTED FOR REVIEW

The Fourth Circuit Court of Appeals had decided that a Henrico County, United States citizen of Richmond, Virginia, is not entitled to relief sought under Bankruptcy Employment Discrimination!

Are the Courts arbitrary and misguided in their decisional process to conclude that there was no jurisdiction founded on the existence of the Federal Question as the action arises under the Constitution of the United States, Article I, Section 8, Clause 4: the First Amendment to the Constitution of the United States?

Is that finding of the United States District Court and the United States Court of Appeals so contrary in the state of Virginia and so self-contradictory to Federal laws, that this Court should exercise its power of supervision and reverse the Fourth Circuit?

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IN THE
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ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS UNITED STATES
FOR THE FOURTH CIRCUIT

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Ramona S. Burnette, respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, infra, App at 1.

## JURISDICTION

Petitioner (plaintiff) filed this case in the United States District Court for the Eastern District of Virginia, Richmond Division, as founded on the existence of a Federal question. The action arises under the Constitution of the

United States, Article I, Section 8, Clause 4; and the First Amendment to the Constitution of the United States. Jurisdiction founded on the existence of a question arising under particular statutes. The action arises under the Act of Bankruptcy, U.S.C., Title 11, §525(a) and §525(b), as hereinafter more fully appears. Jurisdictional Amount- U.S.C., Title 28, §1331 (Federal question; amount in controversy; costs) as amended by PL 85-554, 72 Stat. 415, July 25, 1958, require that the amount in controversy, exclusive of interest and cost, be in excess of $10,000. Further action arises under Jurisdiction and Venue – U.S.C., Title 28, §1334(a), §1334(b), §1334(c). Action arises under Miscellaneous Statute – 42 U.S.C. §1983. Action arises under Article 3, Section 2, Clause 1(a). Action arises under Article 3, Section 2, Clause 2. Action arises under Amendment V. Action arises under Amendment VII. Action arises under Amendment IX. Action arises under Amendment XIII. Action arises under amendment XIIII, Section 1. Action arises under Amendment XIV. The amount in controversy is in excess of $300,000.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

Article 3, Section 2, Clause 1(a);

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, or which shall be made, under their Authority.

Article I, Section 8, Clause1;

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States, but all Duties, Imposts and Excises shall be uniform throughout the United States.

Article 3, Section 2, Clause 2;

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Amendment I;

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a REDRESS OF GRIEVANCES.

Amendment V;

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, without due process of law; not shall private property be taken for public use, without just compensation.

Amendment VII;

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment IX;

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIII, Section I;

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV, Section 2;

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Amendment XIV, Section 3;

nor shall any State deprive any person of life, liberty, or property, without due process of law.

Amendment XIV, Section 4;

nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XVI;

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Title 11, 525 of the United States Code:
Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "Act making appropriations for the Department of Agriculture for the fiscal y ar ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to new a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt.

(1) IS OR HAS BEEN A DEBTOR UNDER THIS TITLE OR A DEBTOR OR BANKUPT UNDER THE BANKRUPTCY ACT;

(2) Has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) Has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

Title 28, 1331; of the United States Code;
FEDERAL QUESTION

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Amended by PL 85-554, 72 Stat. 415, July 25, 1958

Title 28, 1334; of the United States Codes;
BANKRUPTCY CASES AND PROCEEDINGS

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State laws, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Title 42, 1983; of the United States Code;
CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Ramona S. Burnette, petitioned the United States District Court with a formal complaint of BANKRUPTCY DISCRIMINATION and to establish BANKRUPTCY DISCRIMINATION in a manner of a foregone occurrence with supporting documents submitted per said complaint.

Ramona S. Burnette, filed as a Pauper Case. If for some reason the Process Receipt and Return were improperly executed this was not the mistake of Ramona S. Burnette, but rather the fault of the United States District Courts and/or the United States Marshals Service. The Process Receipt and Return were served on Mr. Tom A. Broadhead/Signet/Capital One Bank.

Ramona S. Burnette, secured an attorney - Mr. Alan Banov, of which Mr. Banov, wrote the Registered Agent for Signet Bank by the name of Mr. Nathan Taylor – Director, Human resources – Signet Bank/Virginia – 7 North 8th Street – Richmond, Virginia 23219; and the letter is dated May 16, 1995. However, Mr. Banov ends his letter with the following statement, "If you do, Please have one of your attorneys contact me." The next response comes from *one* of the attorneys from Signet Bank/Virginia by the name of Mr.

Tom A. Broadhead; as this letter is dated June 29, 1995. It appears that the Registered Agent – Mr. Nathan Taylor has passed his authority and corporate powers to Mr. Tom A. Broadhead. This letter dated June 29, 1995, is addressed to Mr. Banov from Mr. Broadhead. The ending statement of Mr. Broadhead's letter states, "If you have any questions or additional information you would like to provide, please feel free to contact me (804) 967-1145. – To note further that the letterhead of Mr. Broadhead's letter list the address of which he can be found. The address given is CAPITAL ONE BANK – 11013 West Broad Street – P.O. Box 85525 – Richmond, Virginia 23285-5525.

Burnette applied for employment with Signet Bank on November 12, 1993. The position sought was a Data Entry Operator and the classifieds gave no specifics for key strokes per hour in the Richmond – Times Dispatch Sunday paper. Burnette talked to a Ms. Linda H. Roberts about several clerical positions which at that time were currently open with Signet Bank. She pulled my credit report and noticed I had one outstanding debt. Ms. Roberts made reference to this debt and should be taken care of before Burnette could be hired by Signet Bank. Currently, Equifax has erred in reporting this data or fact of $379.00. This debt was filed under a chapter 7 Bankruptcy. Furthermore, Ms. Roberts counseled Burnette. In the interview about how bankruptcy applicant posed a security risk for the bank! So namely one, how could paying this outstanding debt get Burnette a job with Signet Bank when Ms. Roberts counseled Burnette about this bankruptcy on her record as a potential risk for the bank and namely two, the debt had been filed under a Chapter 7 Bankruptcy. Ms. Roberts continued with "there had been specifics of employees that continued with "there had been specifics of employees that embezzeled money from customers and from the bank". Ms. Roberts gave Burnette her business card with a 1 800 685 1111 to call and to pay this $379 outstanding debt before hiring Burnette as an employee. The last event to have occurred

was sent in a form of correspondence dated November 16, 1993 from Ms. Linda H. Roberts. She states "based on the information received from the Bureau, we can not continue to consider you for employment at this time".

The Bankruptcy – Discharge of Debtor – Chapter 7 was filed on March 16, 1992.

Burnette had previously worked in sensitive, security and/or financial areas of employment. An example is the Resolution Trust Company under the United States Department of Justice which secured a failed local bank. This position was through Manpower, Inc.

Burnette has never had flagrant violations with local, state or federal law enforcement personnel or authorities. This of course can be easily checked with all forms of law enforcement agencies.

The hire wages for Signet Bank on November 12, 1993 are based on the first interview at $8.00 per hour.

Burnette needed a job and applied for employment with Signet Bank on June 16, 1994. The position sought was a Data Entry Operator and the classifieds gave no specifics for key strokes per hour in the Richmond – Times Dispatch Sunday paper. Burnette had an interview and talked with a Mr. Matthew E. Allen, IIII. Mr. Allen talked about running a credit report and if everything looked o.k. then Burnette would be hearing from Signet/Capital One soon. Mr. Allen tested my keystrokes in a noisy test room by leaving the door open which very well effects the final test results. Mr. Allen figures right that noisy environments reduce keystrokes on the average. Burnette's supporting documents put Burnette in the position of a Senior Data Entry Operator because of a very high keystrokes per hour noted to be 15,924.088 keystrokes per hour and documented by CDI Temporary Services, Inc., 8001 Franklin Farms Drive, #126, Richmond, Virginia 23229.

The lack of merit of Ms. Burnette's rejection is highlighted by the fact that during the summer of 1994, two years after Burnette filed for bankruptcy, Burnette was

employed as a temporary worker for Kelly Temporary Services in the very same position for which she had applied. The previous statement only means that Burnette was formerly employed at Signet Bank's Corporate Headquarter's in Glen Allen, Virginia, so was familiar with Signet Bank's procedures and operations, and was very well qualified for the positions advertised. Burnette worked as a data entry clerk and in that capacity had access to VISA and MASTERCARD computer files. There was no problem whatsoever from that assignment to work for Signet Bank/Capital One Bank. Before and since, Burnette has also worked for other employers with similar security interests.

One last statement with regards to the facts of Mr. Allen. When Burnette was not hired by Signet/Capital One Bank but was on site at Signet/Capital One Bank by Kelly Services and was probably identified by the Human Resources Department that Burnette was on site and the next to happen to Burnett's temporary position with Signet/Capital One Bank was terminated. Therefore, Signet/Capiral One Bank has violated the Bankruptcy Code in the typical practices of discriminating against Ms. Burnette.

The hire wages for Signet/Capital One Bank on June 16, 1994, are based on the second interview at $8.00 hour.

## REASONS FOR GRANTING WRIT

The request for a Default Judgment was submitted to the United States District Court on May 14, 1998. The reason for the request was based on the fact that the summons was not properly served to the right person named in the original complaint as filed.

A submission of a letter dated June 29, 1995, proves the anonymous personage of Tom A. Broadhead/Counsel.

When corporation liable for punitive damages. – In such case the person who has suffered injury may recover compensatory damages from the corporation as principal,

and may recover punitive damages if the principal has authorized the act or has subsequently ratified it. *Jordan v. Melville Shoe Corp.*,150 Va. 142 S.E. 387 (1928). The Process Receipt and Return was served on Tom A. Broadhead.

Process may be served by person other than officer to whom directed. *Crosswhite v. Barnes*, 139 Va. 471, 482, 124 S.E. 242 (1924); *Federal Land Bank v. Birchfield*, 173 Va. 200, 3 S.E. 2d 405 (1939). The Process Receipt and Return was served on Tom A. Boardhead.

Manager of corporation. – If the president of a corporation was clothed with power to employ a manager for the corporation, and employed one as his agent to conduct negotiations and submit a proposition to plaintiff, then the acts of the agent were the acts of the president, and any memorandum, note or contract signed by him was a memorandum, note or contract signed by the party to be charged. *Radford Water Power Co. v. Dunlap*, 128 Va. 658, 105 S.E. 257 (1920). The Process Receipt and Return was served on Tom A. Broadhead.

The Process Receipt and Return was served on January 23, 1997, but the correct year is 1998. The Defendant's response was to be submitted in twenty days. The actual answer from the defendant's came on the date of April 24, 1998. Then again Mr. Broadhead did not respond to the acts he committed. The paper trails defines the Default made by the defendants(s). The law states if the defendant does not file an answer to the complaint or a motion attacking the complaint or otherwise respond in the prescribed twenty days, the defendant is in default and judgment may be entered against the defendant without a trial. Rule 55. Default - (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's DEFAULT. There is JUDGMENT by the clerk and by the court!! Burnette had

asked the United States Court of Appeals to observe the Default and to conclude there was a simple case of Default on the actions of the Defendant.

This Court must declare a court decision unconstitutional in the case of *Fiorani v. CACI,* 192 B.R. 401 E. D. Va. 1996. However, to impart the following is that most important of all, if there is any possibility of construing a statute so as to render it constitutional, the courts must do it.

The clause in the 5th Amendment pertaining to deprivation of life, liberty, or property without due process of law applies only to the Federal government but there is a parallel clause requiring application of due process by the states in the 14th Amendment. This means that the law must "play fair." It requires compliance not only with the outward forms of the law but with all that is meant by the ideas of liberty and justice for all.

Substantive due process means that laws that create rights, define crimes, or regulate behavior must be reasonable and not arbitrary. A law that makes some conduct illegal and provides for a fine or prison sentence for commission of some act must be restricting a truly anti-social act. The purpose of the law is, therefore, involved in determination of substantive due process. Does the interactions of private institutions receiving federal contracts or procurement must also be governed by fairness? Let's infer that Signet Capital One Bank do receive FDIC – Federal Deposit Insurance Corporation – funds paid for and by the American public through Federal taxes. In the context of civil litigation, due process also encompasses a requirement of fundamental fairness.

The 7th Amendment, then, involves civil law suits in federal courts that are based on something other than a specific right created exclusively by an act of Congress and in which monetary damages are sought.

The 9th Amendment is designed to protect the rights of the minority from the will of the majority. Individuals

who believe certain things cannot be persecuted by those who impose other or who would impose other values upon them, even if almost all of the population despises what the individual believes. This amendment was added because Alexander Hamilton believed the Bill of Rights to be dangerous. He took the position that listing certain rights throughout the other amendments and giving them specific protection would leave the government free to transgress any that had not been so enumerated.

The peonage of condition occurs in this Amendment 13. A condition of slavery whether of the Civil War era or Twentieth Century era, the outward forms of slavery exist between employee and employer/corporation. The employer/corporation acts as the master and the employee is the servant as a recipient of any acts, rules or decisions rendered by employer/corporation that the servant/employee may or may not agree to such acts that the employer/corporation would perpetrate an act upon others without the consideration of the law. To state correctly of the action arises under Amendment 13, Section 1.

In Summary, requirements for substantive due process demand that the federal government (or states, under the 14th Amendment) or the institutions they support may not deprive any person (not just citizens) of life, liberty, or property without good reason and in a fair manner. In our complex society, questions of governmental fairness are around us every day. There appears to be also social responsibility in law.

As for the Time-Barred-FEDERAL COURTS DO NOT ADOPT STATE STATUTES OF LIMITATION IN CASES INVOLVING FEDERAL QUESTION. *Alessio v. Adkins*, 102 Bankr. 485 (Bankr. E.D. Va. 1989). To include that the Federal law fixes time of right of action accrues. – In actions under 42 U.S.C. §§1983 and 1985, while the time limitation itself is borrowed from state law, the federal rule fixes the time of accrual of a right of action. *Buntin v. Board of Trustees*, 548 F. Supp. 657 (W.D. Va. 1982).

The single cause of action or right of action is known as Title 11 – Bankruptcy - §525(a) [USED ONLY AS A COMPARISON AT THIS TIME] – a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

The single cause of action or right of action is known as Title 11 – Bankruptcy - §525(b) – No private employer may terminate the employment of, or discriminate with respect to employment against an individual who is (this relates to being a descriptive clause in the present tense) or has been a debtor under this title, (this relates to being a descriptive clause in the past tense) a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt-

(1) is or has been a debtor under this title or a debtor or a debtor or bankrupt under the Bankruptcy Act;

(2) NOT APPLICABLE – has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharge under the Bankruptcy Act.

The verbage of "no private employer may terminate the employment of " (refers to the fact that an individual during their course of employment are terminated).

The verbage of "or discriminate with respect to employment against," (refers to the fact of an employer given the conditions to hire should not engage in deceptive practices to not hire an individual for the sole reason of BANKRUPTCY on the credit report). The reasoning behind this is when corporations/companies receive federal grant funds to be used as community service projects to benefit unrepresented segments of population, a venture in research in a search for alternative fuels or energy to preserve our only biosphere from environmental damages derived from overloads of toxic pollution, and/or any other avenues of choice to obtain federal grants and federal funds to promote an idea. However, it is the "we the people" are taxed under Article XVI – the 16th Amendment and of these taxes a portion goes to federal grants and federal funds. The implications here are that an employer violates the rights of individuals and the United States Constitution that provides for the protection of the rights of individuals. The employer so to speak is to act, acting, or acted in a manner of unconstitutionality.

The verbage of "an individual who is" (refers to the present tense) and "or has been a debtor under this title." (refers to the past tense).

The original cause of action and right of action arises under U.S.C., Title 11 – Bankruptcy, §525. Protection against discriminatory treatment – which includes §525(a) and §525(b) under U.S.C. Title 11. The position of Congress is to uphold the laws of the United States Constitution. Congress clearly provides for discrimination in the passages of §525(a) and §525(b). The passage appears ambiguous but it calls for dissecting portions of the statement to achieve the true meaning therein. If Congress did not provide for discrimination by private employer in §525(b) then Congress has acted unconstitutional!!! Congress would not be so

obvious to provide for protection of discrimination in one passage §525(a) and to preclude protection of discrimination in another passage §525(b). The United States Constitution exclusively restricts the use of loopholes normally used as a way of avoiding the responsibilities of an act committed by Signet/Capital One Bank, Inc.

The dictionary's interpretation of discriminate is " to make clear distinction; distinguish; differentiate and to act on the basis of prejudice." The dictionary's interpretation of discriminatory is marked by, or showing prejudice; biased. The dictionary's interpretation of employment is the act of employing; a putting to use or work and the state of being employed.

Congress would not have repeated a redundancy of law to mean or have the same intent in two different passages such as "no private employer may terminate the employment of" and "or discriminate with respect to employment against, an individual who is or has been a debtor under this title, etc."

Therefore, this is a civil action brought into the proper court of venue, the failure to state a claim is inaccurate, and time-barred - FEDERAL COURTS DO NOT ADOPT STATE STATUTES OF LIMITATIONS IN CASES INVOLVING A FEDERAL QUESTION - and that this civil action enacts clause 1- a material fact was falsely represented or concealed; (such as the McGuire debt showing on the credit report as not being discharged; clause 2- the representation or concealment was made with knowledge of the fact; (such as the Equifax Credit Report; clause 3 – the party to whom the representation was made was ignorant of the truth of the matter; (such as if the underlying reason not to hire was based on an unpaid debt that discharged in bankruptcy; clause 4 – the representation was made with the intention that the other party should act on it; (such as the verbal and written letter referring verbally first to bankruptcy and the written letter of failed to meet requirements but no offer of an explanation in the letter for

the reasons for not meeting requirements; clause 5 – the other party was induced to act on it; (such as the filing of the original complaint into the United States District Court on November 12, 1997; clause 6- the party claiming the estoppel was misled to his injury; (such as relying upon Signet/Capital One, Inc., to honor employment instead as a citizen marked by Bankruptcy and to punish a citizen for acting on Bankruptcy by offer of employment and refusal of employment.

The material facts in the original agreement are true. That this action is not of and in itself of fraud. The fraud exist at the point of CORPORATIONS and the expense of the American citizens.

To be included as further evidence of a paper trail and papers exchanged between the two parties and miscellaneous CLIENT UPDATE refers to Bad Credit? No Job! And other additional papers in support of the Civil Action in the United States District Court and the United States Court of Appeals to redress of grievances as action arises under the United States Constitution Amendment I.

So far this may be the only case to go this far to the United States Supreme Court. That no one person would fight what is wrong and that it gets too costly. That the lower courts would fight Burnette every step of the way and make it very hard and that it would take FIVE ATTORNEYS to fight Burnette in the same manner. That also, First Union wants a piece of the action and that this matter in no way does not involve them. That the courts would twist the normal and logical order of law and make this case appear illogical and inconsistent. It appears that the United States District Courts and the United States Court of Appeals can not follow the United States Constitution, the Bill of Rights, or the laws enacted by the United States Congress. JUSTITIA EST CONSTANS ET PERPETUA VOLUNTAS JUS SUUM CUIQU TRIBUENDI.

## CONCLUSION

The Fourth Circuit Court of Appeals ruling in this case is directly opposite to the decisions of the United States Constitution, the Bill of Rights, or the laws enacted by the United States Congress. Also, those rulings are so inconsistent and so wrong as to require that this Court use its supervisory capacity to correct the Fourth Circuit Court of Appeals. That this Supreme Court of the United States should reverse the Fourth Circuit Court of Appeals ruling. Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

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**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**No. 98-2242**

RAMONA S. BURNETTE,
Plaintiff - Appellant,

versus

SIGNET/CAPITAL ONE BANK,
Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (CA-97-865-3)

Submitted: January 21, 1999
Decided: February 3, 1999
Entered: February 3, 1999

Before LUTTIG, MOTZ, and KING,* Circuit Judges.
Affirmed by unpublished per curiam opinion.

Ramona S. Burnette, Appellant Pro Se. Ronald Nicholas Regnery, CHRISTIAN & BARTON, Richmond, Virginia; Bruin S. Richardson, III, WRIGHT, ROBINSON, OSTHIMER & TATUM, Richmond, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

---

* Judge King did not participate in consideration of this case. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

PER CURIAM:

Ramona Burnette appeals the district court's order awarding costs to the Defendant and dismissing as barred by the statute of limitations her complaint in which she alleged bankruptcy discrimination. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Burnette v. Signet/ Capital One, No. CA-97-865-3 (E.D. Va. July 20, 1998). Additionally, we deny Capital One's and Signet's motions for sanctions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1125
CA-97-865-3

RAMONA S. BURNETTE

Plaintiff - Appellant

v.

SIGNET/CAPITAL ONE BANK

Defendant - Appellee

Filed: March 19, 1999
Entered: March 19, 1999

**ORDER**

The appellees have filed a motion for sanctions.

The Court defers action on the motion pending assignment of this case to a panel, for review along with the merits of the case.

For the Court - By Direction

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETT

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: February 10, 1999
Entered: February 10, 1999

**ORDER**

THIS MATTER is before the Court on Plaintiff's motion to proceed in forma pauperis on appeal from this Court's Order denying as moot her motion for a default judgment. Upon due consideration of the motion and the affidavit in support thereof, the motion is DENIED.

Let the Clerk send a copy of this Order to Plaintiff and all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

February 10, 1999
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA BURNETT

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: January 14, 1999
Entered: January 14, 1999

**ORDER**

THIS MATTER is before the Court on Plaintiff's Motion for Default Judgment, filed with the Court on July 27, 1998. As the Court dismissed Plaintiff's suit with prejudice on July 20, 1998, Plaintiff's Motion is MOOT.

Let the Clerk send a copy of this Order to the plaintiff and all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

January 14, 1999
DATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2242
(CA-97-865-3)

RAMONA S. BURNETTE,

Plaintiff - Appellant,

versus

SIGNET/CAPITAL ONE BANK,

Defendant - Appellee.

Filed: September 17, 1998
Entered: September 17, 1998

**ORDER**

Appellees Capital One and Signet Bank each have filed a motion for sanctions. Appellant has filed responses in opposition to the motions.

The Court defers action on the motions pending the parties' filing of informal briefs.

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA BURNETTE

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: September 15, 1998
Entered: September 15, 1998

**ORDER**

THIS MATTER is before the Court on Defendants' Motion for Attorneys' fees, filed on August 3, 1998. Plaintiff has filed a notice of appeal in this case, and the entire record has been transferred to the United States Court of Appeals for the Fourth Circuit. The Court therefore STAYS its ruling on Defendants' motion pending resolution of Plaintiff's appeal.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

September 15, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: July 22, 1998
Entered: July 22, 1998

**ORDER**

THIS MATTER comes before the Court on Defendant's July 20, 1998 Motion to Dismiss. Having resolved the matters presented therein, the instant motion is MOOT. The Court REFERS the parties to its July 20, 1998 Final Order.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 22, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: July 20, 1998
Entered: July 20, 1998

**FINAL ORDER**

THIS MATTER comes before the Court on the Defendant Capital One Bank's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*. For the reasons stated below, the Court hereby GRANTS the motion.[1]

---

[1] Capital One has agreed to waive service in this case. The facts underlying Ms. Burnette's Complaint pre-date Capital One Financial Corporation's separation from Signet Bank. Capital One represents that it is not authorized to waive service for Signet Bank.

There is no indication that Signet Bank has been properly served in this action. Plaintiff served Bruin Richardson and Tom Broadhead. Neither person is an officer, director or registered agent of Signet Bank or Capital One. The Court hereby DISMISSES each complaint for insufficient service of process. While a dismissal on this ground usually permits corrective action, the Court DISMISSES WITH PREJUDICE for the reasons stated in this Final Order.

I.

Ramona S. Burnette brings this action alleging bankruptcy discrimination in violation of 11 U.S.C. § 5252(b). Initially, Burnette endeavored to proceed under two separate actions; however, given the substantial similarities in the two cases, this Court has consolidated them. For purposes of this motion only, the Court assumes the facts, as alleged in the Complaint, are true. Ms. Burnette contends that she applied for employment as a Data Entry Operator on November 12, 1993 and again on June 16, 1994.

In November 1993, Ms. Burnette responded to an ad placed by Signet Bank in the Richmond Times Dispatch. The ad indicated available employment opportunities for Data Entry Operators but did not mention desired key strokes per hour. Ms. Burnette applied for the position and spoke with Ms. Linda Roberts at Signet Bank. Roberts indicated to Burnette that an outstanding debt on her credit report did not favor employment and encouraged Burnette to pay the debt. Ms. Burnette owed $379.00 to McGuire Clinic or Virginia Physicians. At that time, Burnette was under chapter seven bankruptcy. Roberts communicated the bank's reservations in employing a person who was under bankruptcy.

Ms. Burnette applied for the same position seven months later in June of 1994. On this occasion, she spoke with Mr. Matthew E. Allen, III. Mr. Allen reviewed Burnette's credit history and tested her competency as a Data Entry Operator. Burnette's filing for bankruptcy remained on her credit history. Again, Signet/Capitol One denied employment to Burnette.

Burnette notes that during the summer of 1994, two years after she applied for bankruptcy, she gained employment with Kelly Temporary Services as a Date Entry Operator. She was placed at Signet Bank's corporate headquarters in Glen Allen, Virginia. She believes that the Human Resources identified her as a previous applicant. Based on her previous application, Burnette believes that the

department was aware of her credit history and terminated her temporary position. Nothing in Burnette's background would tend to indicate that she is untrustworthy or otherwise used her access to financial and private information for personal gain.

II.

A. Subject Matter Jurisdiction: Rule 12(b)(1)

The standard of review for a 12(b)(1) motion is a function of the motion's purpose. Where the motion constitutes a facial attack upon the complaint's allegations of subject mater jurisdiction, the Court must presume that all factual allegations in the complaint are true, Puerto Rico ex. rel. Quiros v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980), aff'd, 458 U.S. 592 (1982), and make all reasonable inferences in the plaintiff's favor. Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969); MacKethan v. Peat, Marwick, Mitchell & Co., 439 F.Supp. 1090 (E.D. Va. 1977). In cases where the motion challenges the actual existence of the Court's subject matter jurisdiction, the Court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (citations omitted); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982); Ocean Breeze Festival Park, Inc. v. Reich, 853 F. Supp. 906, 911 (E.D. Va. 1994).

It is the plaintiff's burden to prove that jurisdiction in this Court is proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Adams, 697 F.2d at 1219; Fleming v. Workers' Comp. Com'n, 878 F.Supp. 852, 857 (E.D. Va. 1995). Further, the contents of the plaintiff's complaint lack conclusinve force, and merely serve as relevant evidence on the issue. 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure: Civil 2d §

1363, at 456 (1990); Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583 (Fed. Cir. 1993). And while the Court will read the plaintiff's complaint as a whole and will construe it broadly and liberally, it is not bound to draw argumentative inferences in the plaintiff's favor. Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA, 857 F. Supp. 1137, 1140 (M.D.N.C. 1994).

B. Failure to State a Claim: Rule 12(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move for dismissal of a claim on the grounds of failure to state a claim upon which relief can be granted. The function of motions to dismiss is to test the law governing claims, not the facts which support them. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984).

When considering such a motion, the Court must presume that all factual allegations in the complaint are true. See Puerto Rico ex. rel. Quiros v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980). All reasonable inferences must be made in favor of the non-moving party. See Johnson v. Mueller, 415 F.2d 354 (4th Cir. 1969); MacKethan v. Peat, Marwick, Mitchell & Co., 439 F. Supp. 1090 (E.D. Va. 1977). The Court should not dismiss any count unless it appears beyond a doubt that the plaintiff could not recover under any set of facts which could be proven. See Doby v. Safeway Stores, Inc., 523 F. Supp. 1162 (E.D. Va. 1981); Austin v. Reynolds Metals Co., 327 F. Supp. 1145 (E.D. Va. 1970).

III.

Defendant Capital One Bank moves to dismiss the Complaint for two compelling reasons. First, Capital One notes that the applicable statute, LJ U.S.C. § 525(b) does not apply to Ms. Burnette or the facts of this case. Second,

Capital One argues that the applicable statute of limitations operates to bar Plaintiff's claims. Upon careful consideration, the Court agrees.

A. Bankruptcy Discrimination in Violation of 11 U.S.C. § 525(b)

The relevant part of this statute provides:

> No Private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title [or] a debtor or bankrupt under the Bankruptcy Act... solely because such debtor or bankrupt--(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act[.]

11 U.S.C. § 525(b). In In re Hardy, 209 B.R. 371 (E.D. Va. 1997), the Bankruptcy Court examined the legislative history of this provision and found that the correct reading requires the debtor be an employee of the employer-defendant. Id. at 378. Previously, this Court articulated the same principle. See Fiorani v. CACI, 192 B.R. 401, 408 (E.D. Va. 1996)(dismissing claim for discrimination in hiring because it did not allege termination of employment or discrimination with respect to employment under 11 U.S.C. §525(b)).

The Supreme Court has acknowledged a court's duty to refrain from reading a phrase into a stature when Congress has left it out. Keene Corp. v. U.S., 508 U.S. 200, 208 (1993). Courts must recognize that Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular language. See Russello v. United States, 464 U.S. 16, 23 (1983). While Congress specifically prohibited "denying employment" on the basis of bankruptcy filing in § 252 (a), Congress did not recognize the same in

§252(b). Having indicated its willingness to create a cause of action for discrimination in the denial of employment in §525(a), the Court declines to read the same into § 525(b)(2).

There is sufficient distinction between Burnette's November 17, 1997 Complaint and her June 16, 1998 Complaint. Under the above standard, the claims in Burnette's November 17, 1997 Complaint must be dismissed with prejudice. She was not an employee and the statute does not cover Signet/Capital One's decision not to hire Ms. Burnette. With regard to Burnette's June 16, 1998 Complaint, she alleges that Signet/Capital One employed her as a Data Entry Operator through Kelly Services, a temporary employment agency. Burnette believes that someone in the Human Resources Department identified her as previously rejected applicant and used this information to terminate her temporary employment.

In Fiorani, this Court held that a temporary employee can maintain an action against the private employer under § 525(b). Fiorani, 192 B.R. at 408-09. The plaintiff must show that the defendant is her "employer" as evidenced primarily by the right to control the individual's work. Id. at 409 (citing Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979)). While this remains the primary factor, other Spirides factors include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both

> parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id.

The court must dismiss this claim because Burnette offers no facts to assist the Court consider the most basic of the Spirides factors, namely, Signet/Capital One's right to control the means and manner of her work performance. Instead, she offers speculation on what may have occurred and draws no casual connection between her application, employment through temporary agency and termination. Considering the facts in the light most favorable to Burnette does not require the Court to engage in guesswork as to the substance of her claims. Accordingly, the Court DISMISSES this portion of her Complaint as well.

B. Statute of Limitations

An Act of Congress enacted after December 1, 1990 which does not contain a statute of limitations falls under the "catchall" provision of Title 28 U.S.C. § 1658 which sets a four year statute of limitations. For statutes enacted before December 1, 1990, courts look to closely analogous state statutes for the applicable period of limitations. See North Star Steel Company v. Thomas, 515 U.S. 29, 33-34 1995). In North Star, the Supreme Court notes that borrowing the applicable statute of limitations from state statutes in the absence of federal direction is longstanding and settled. Id. at 34.

The protections afforded in 11 U.S.C. § 525(b), enacted before December 1, 1990, do not contain a statute of

limitations. Therefore, the Court shall look to closely analogous state law for direction. Virginia law does not recognize a cause of action for bankruptcy discrimination. However, employee discharge is recognized as a tort and generally subject to a two year statute of limitations under the "catch-all" provisions of Va. Code Ann. §8.01-248 (Michie 1998). A personal action accruing before July 1, 1995 is subject to a one year statute of limitations. Va. Code Ann. §8.01-248 (Michie 1992).

The first of Burnette's two actions accrued on November 12, 1993, the second on June 16, 1994. Inasmuch as the four year statute of limitations contained in 28 U.S.C. § 1865 does not apply, the Court looks to the applicable state statute. Even if Burnette had a cognizable claim under the law, it expired June 16, 1995. Consequently, the Court must dismiss both claims with prejudice.

For the reasons stated above, the Court hereby GRANTS the motion. This case is DISMISSED WITH PREJUDICE. Finding Plaintiff's Complaint wholly without merit, the Court AWARDS Capital One its fees and costs in defending this action.

The Court provides NOTICE to the Plaintiff, proceeding pro se, that she may appeal this decision to the United States Court of Appeals for the Fourth Circuit by filing a Notice of Appeal within 30 days of the date of this Final Order.

Let the Clerk send a copy of this Final Order to Plaintiff and all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 20, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

RAMONA S. BURNETTE

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:98CV373

Filed: June 30, 1998
Entered: June 30, 1998

**ORDER**

It appearing that the above-named case is substantially similar to Burnette v. Signet/Capital One Bank, 3:97CV865, currently before United States District Judge James R. Spencer, Eastern District of Virginia, the case is TRANSFERRED to Judge Spencer.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

June 30, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE, pro se,

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: July 8, 1998
Entered: July 8, 1998

**ORDER**

THIS MATTER is hereby CONSOLIDATED with 3:98CV373. The parties are directed to file all subsequent pleadings under 3:97CV865.

Having demonstrated a financial ability to pay for the prosecution of her case, the Court hereby VACATES its November 17, 1997 Order granting in forma pauperis status to the Plaintiff Ramona S. Burnette. Ms. Burnette shall pay any subsequent costs in full.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 8, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE, pro se,

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:98CV373

Filed: July 8, 1998
Entered: July 8, 1998

**ORDER**

THIS MATTER is hereby CONSOLIDATED with 3:97CV865. The parties are directed to file all subsequent pleadings under 3:97CV865.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

July 8, 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE, pro se,

Plaintiff,

v.

SIGNET/CAPITAL ONE BANK

Defendant.

Civil Action Number 3:97CV865

Filed: November 17, 1997
Entered: November 17, 1997

**ORDER**

THIS MATTER comes before the Court on Plaintiff Ramona S. Burnette's Motion to Proceed in forma pauperis. Upon due consideration, the Court hereby GRANTS Plaintiff's Motion. The Court DIRECTS the Clerk's Office to file the Plaintiff's Complaint and supporting documents.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

November 17, 1997
DATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2242
CA-97-865-3

RAMONA S. BURNETTE

Plaintiff - Appellant

v.

SIGNET/CAPITAL ONE BANK

Defendant - Appellee

Filed: March 15, 1999
Entered: March 15, 1999

**On Petition for Rehearing and Rehearing En Banc**

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR.
UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517
TELEPHONE: (804) 916-2700

PATRICIA S. CONNOR
CLERK

March 25, 1999

Ramona S. Burnette
P.O. Box 18221
Richmond, VA 23226

Roanld Nicholas Regnery, Esq.
CHRISTIAN & BARTON
1200 Mutual Building
909 East Main Street
Richmond, VA 23219

Janet Stuart Jenness, Esq.
WRIGHT, ROBINSON, OSTHIMER & TATUM
4th Floor
411 East Franklin Street
Richmond, VA 23219

Re: 99-1125 Burnette v. First Union Bank
CA-97-865-3

Dear Appellant and Counsel:

Pursuant to this Court's request of March 12, 1999, appellees' attorneys have filed responses indicating that Signet Bank and Capital One are no longer one entity. Also,

Signet Bank has indicated that they are now First Union Bank. Please find enclosed a copy of the caption in this case specifying the appropriate parties.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Carina T. Domeika
Deputy Clerk

cc: Norman H. Meyer, Jr.

Docket No. 99-1125

RAMONA S. BURNETTE

Plaintiff - Appellant

v.

FIRST UNION NATIONAL BANK,
formerly known as Signet Bank;
CAPITAL ONE BANK

Defendants - Appellees

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2242
CA-97-865-3

Burnette v. Signet/Capital One

Filed: March 23, 1999
Entered: March 23, 1999

MANDATE

The judgment of this Court dated 2/3/99 takes effect today.

PATRICIA S. CONNOR
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RAMONA S. BURNETTE

v.

SIGNET/CAPITAL ONE BANK

CASE NO--3:97CV865

NOTICE OF PRETRIAL CONFERENCE

Please be advised that the above-styled civil action has been place on Judge Spencer's docket for trial. Judge Spencer has requested a pretrial conference for July 30, 1998, at 9:15 a.m. It is anticipated that the conference will last approximately five (5) minutes. The conference will take place in the Chambers of Judge Spencer, First Floor, United States Courthouse, Tenth and Main Streets, Richmond, Virginia.

At this conference the Court will set a trial date. All counsel should anticipate a trial date within ninety (90) days of the date of the pretrial conference except in cases of protracted litigation.

Counsel attending the pretrial conference are to be sufficiently knowledgeable of the case to respond to such queries as the Court may deem appropriate, be prepared to set a firm trial date, and to discuss settlement prospects.

NORMAN H. MEYER, JR., CLERK

By: /s/ Linda K. McDonald
Linda K. McDonald
Deputy Clerk

Date: July 12, 1998

IF THIS CASE IS SETTLED PRIOR TO THE CONFERENCE, PLEASE CALL THE CLERK'S OFFICE AT 771-2612. THANK YOU.

DISMISSED 07/29/98 WEDNESDAY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
LEWIS F. POWELL, JR. COURTHOUSE BUILDING
SUITE 307
1000 EAST MAIN STREET
RICHMOND, VIRGINIA 23219-3525

CHAMBERS OF
JAMES R. SPENCER
DISTRICT JUDGE

TELEPHONE
(804) 643-6081

To Counsel of Record:

It is possible that the Court may determine that this case is suitable for magistrate's jurisdiction. The parties shall be deemed to have consented and agreed to such jurisdiction unless a party informs the Court of its unwillingness to proceed before the Magistrate Judge. Any such communication with the Court must be in pleading form and filed with the Clerk of the Court prior to the Pretrial Conference.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Capital One
Capital One Bank
11013 West Broad Street
PO Box 85525
Richmond, VA 23285-5525

June 29, 1995

Alan Banov, Esquire
1819 H Street, N.W., Suite 360
Washington, D.C. 20006

Re: Ramona Burnette

Dear Mr. Banov:

This is in response to your letter dated May 16, 1995.

Our investigation of this matter reveals that on June 17, 1994, Ms. Burnette applied for a DSI Operator position at Signet Bank/Virginia. Ms. Burnette listed her key punch skills at 15,924 strokes per hour. However, when Ms. Burnette was tested, her key punch skills were 10,180 strokes per hour. The standard score that the Bank was looking for in this position was 15,000 key strokes per hour. As a result, the Bank did not feel that Ms. Burnette's skills were as strong as the other candidates that applied for the position. In addition, upon reviewing Ms. Burnette's credit report, it was determined that she had a delinquency with McGuire Clinic that was not included in her bankruptcy. Because Ms. Burnette's skills were not as strong as the other candidates and there was a question about her delinquency, the Bank decided to choose another candidate for this position.

The Bank spoke to Ms. Linda Roberts, who allegedly told Ms. Burnette that she was not hired because of her bankruptcy. Ms. Roberts has informed me that she was not recruiting for the Bank during the time that Ms, Burnette

applied for this position and does not know how Ms. Burnette obtained her name. However, even if Ms. Roberts had spoken to Ms. Burnette, Ms. Roberts stated that she would not have said that to Ms. Burnette. It is not the Bank's policy to deny employment to someone because of bankruptcy. Ms. Roberts has been employed in the human resources department of the Bank for some time and is very much aware of this policy.

As a result of our investigation, the Bank does not believe it violated the Bankruptcy Code by not hiring Ms. Burnette for this position. In addition, the Bank does not believe its actions warrant the settlement demand you have asked for.

If you have any questions or additional information you would like to provide, please feel free to contact me at (804) 967-1145.

Sincerely,

/s/ Tom Broadhead
Tom A. Broadhead
Counsel

ALAN BANOV, Attorney-at-Law
1819 H Street, N.W., Suite 360, Washington, D.C. 20006
(202) 822-9699 FAX: 822-6392 TDD: 822-0720

May 16, 1995

Mr. Nathan Taylor
Director, Human Resources
Signet Bank/Virginia
7 North 8th Street
Richmond, Virginia 23219

Re: Ramona Burnette v. Signet Bank

Dear Mr. Taylor:

I have been retained by Ramona Burnette, who applied to you for employment in June 1994 as a DSI operator of Optical Character Recognition Operator. She was formerly employed at Signet Bank's corporate headquarters in Glen Allen, so was familiar with your operations, and she was very well qualified for the postitions advertised. (A copy of her current resume is enclosed.) She had no criminal record.

However, Ms. Burnette was rejected for both positions.

The July 19, 1994, letter from Matthew E. Allen III to her stated that Signet had selected another candidate whose experience better met the needs of the position. However, when she was informed about why she was not selected, she was told by Linda Roberts, personnel interviewer, that it was because of her bankruptcy in 1992. Thus, Ms. Roberts stated, "We consider anyone who's been through bankruptcy as a risk." She further noted that Ms. Burnette would have access to VISA and Mastercard accounts, as if to insinuate that she would try to embezzle funds from such accounts for her own personal use..

Perhaps those deciding not to hire Ms. Burnette were unaware that the federal Bankruptcy Code, 11 U.S.C. §525(b), prohibits discrimination in, among other things, employment based on a debtor's filing or pursuing a bankruptcy petition. Thus, the statute provides:

> (b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt--
>
> > (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
> > (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
> > (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

The lack of merit to Ms. Burnette's rejection is highlighted by the fact that in June 1994, two years after she filed for bankruptcy, she was employed as a temporary worker for Kelly Temporary Services in the vary same position for which she applied. She worked as a date entry Clerk and in that capacity she had access to VISA and

Mastercard computer files. There was no problem whatsoever from that assignment to work for you. Before and since, she has also worked for other employers with similar security interests. (Names are available upon request.)

Based on the foregoing facts, we believe that Signet has violated the Bankruptcy Code in discriminating against Ms. Burnette. Before filing a complaint in court to rectify the situation, we are writing you to determine whether Signet would want to settle this matter informally.

If you do, please have one of your attorneys contact me. Thank you very much for your cooperation.

Sincerely,

/s/ Alan Banov
Alan Banov

AB/se
Enclosure
cc (w/o enclosure):
Ms. Ramona Burnette

CLIENT UPDATE

Bad Credit? No Job!

Did you know that bad credit can keep you from getting a job? More employers are using credit reports as a hiring tool, but it's only since last fall that companies have been required by federal law to get written permission to check you credit reports as part of your employment application.

Employers also need to give applicants a summary of their rights under the credit law, including the right to dispute inaccurate information in the credit report. If your credit history was a factor in your rejection, or even in denying you promotion, they must notify you of that fact and provide a copy of the report.

Unfortunately, the federal law, which amends the Fair Credit Reporting Act of 1971, is long and complex. Employers may not be complying with the new law or may even not understand what they are required to do now.

You may wish to check your credit reports before applying for a new job, or if you think it may have been a factor in your rejection. To get a hold of your reports, contact:

> Experian (formerlyTRW) (888/397-3742). They will send your report free if you were denied employment due to your Experian report.
> Trans Union (800/888-4213). They will send you report free if you were denied employment due to your Trans Union report.
> Equifax (800/997-2493).

If you need debt-management help, consider contacting a nonprofit assistance organizations such as

Credit Counseling Centers of America (800/493-2222) or Debt Counselors of America (800/680-3328).

Supreme Court, U.S.
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JUL 28 1999
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No. 99-16

In The

# Supreme Court of the United States

RAMONA S. BURNETTE,

*Petitioner,*

v.

TOM BROADHEAD/SIGNET/CAPITAL ONE BANK/FIRST UNION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Respondents Capital One Bank ("Capital One") and Tom A. Broadhead ("Broadhead") submit that there are no questions properly presented for review. Insofar as Petitioner has attempted to set out questions for the Court, they are properly stated as follows:

(1) If the Bankruptcy Code provides a cause of action against a private employer for failure to hire a person based on bankruptcy status, what is the applicable statute of limitations?

(2) Whether the anti-discrimination provisions of the Bankruptcy Code applicable to private employers provide applicants with a cause of action for failure to hire based on bankruptcy status?

## CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, Capital One states that it is a wholly-owned subsidiary of Capital One Financial Corporation, a publicly held corporation.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Capital One and Tom A. Broadhead, by counsel, respectfully submit that Burnette's Petition for Writ of Certiorari should be denied, and the Court should decline to review this case.

## OPINIONS BELOW

The July 20, 1998 opinion and order of the United States District Court for the Eastern District of Virginia and the February 3, 1999 *per curiam* opinion of United States Court of Appeals for the Fourth Circuit are set forth in the Appendix to Burnette's Petition for Writ of Certiorari.

## JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1331 and 11 U.S.C. § 525(b).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 525 (1998):

> (a) Except as provided . . . , a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant

against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt –

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of this case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

28 U.S.C. § 1658 (1998):

Except as otherwise provided by law, a civil action arising under an Act of Congress enacted

> after the date of the enactment of this section [December 1, 1990] may not be commenced later than four years after the cause of action accrues.
>
> Va. Code Ann. § 8.01-248 (1995):
>
> Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.
>
> Va. Code Ann. § 8.01-248 (1984):
>
> Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued.

## STATEMENT OF THE CASE

As Appellant Ramona S. Burnette's ("Burnette") Petition fails to set forth the facts clearly and cogently, Capital One will provide the Court with the relevant facts. For the purposes of Capital One's motions below, the district court assumed the following facts alleged by Burnette to be true.

Burnette contends that she applied for employment with Signet Bank, the corporate precursor to Capital One, as a Data Entry Operator on November 12, 1993 and again on June 16, 1994. In November 1993, Burnette responded to an advertisement in *The Richmond Times-Dispatch* placed by Signet Bank and seeking Data Entry Operators in the Richmond area. The notice did not indicate the minimum number of keystrokes required per minute. Burnette submitted an application and spoke with ~~Linda~~ Roberts, a representative of Signet Bank. As a

part of the application process, Signet Bank obtained Burnette's credit report. The report indicated that she owed $379.00 to the McGuire Clinic, a hospital, or to Virginia Physicians, a medical practice. It also revealed that Burnette was under Chapter 7 bankruptcy. Roberts told Burnette that an outstanding balance did not favor employment, and she encouraged her to pay the debt. She further communicated to Burnette the bank's reservations in hiring a person who was under bankruptcy. Burnette was not employed.

Burnette applied for the same position in June 1994. She spoke with Matthew E. Allen, III of Signet Bank on this occasion. Allen again reviewed her credit history and tested her competency as a Data Entry Operator. The bankruptcy remained on the credit report, and Signet declined to offer her employment.

During the summer of 1994, Burnette obtained employment at Kelly Temporary Services as a Data Entry Operator. She was subsequently assigned to work at Signet Bank's corporate headquarters in Glen Allen, Virginia. Burnette believes that as a result of her previous unsuccessful applications, Signet's human resources department was aware of her credit history and terminated her temporary position at some point during the summer of 1994.

Some time in 1995, Burnette retained Alan Banov, Esquire, of Washington, D.C., to represent her in connection with Signet Bank's earlier refusals to grant her employment. Banov wrote to Signet Bank's Director of Human Resources, Nathan Taylor, on May 16, 1995. The letter contended that Signet's failure to hire Burnette

violated 11 U.S.C. § 525(b). The letter was forwarded for response to Tom A. Broadhead, corporate counsel for Capital One Bank, the newly-formed independent entity that had formerly been Signet Bank's credit card division.

Broadhead investigated Burnette's allegations and responded by letter on June 29, 1995. Broadhead explained that while Burnette listed her key punch skills as 15,924 strokes per hour, she actually tested at a rate of 10,180 strokes per hour. He further commented that the bank was looking for a standard score of 15,000 key strokes per hour. Additionally, Broadhead commented that because her skills were not as strong as others and there was a question about her delinquency, the bank decided to choose another candidate.

Nothing more was heard from Burnette until she filed a Complaint, *pro se*, in the United States District Court for the Eastern District of Virginia on November 17, 1997. She filed a second Complaint on June 16, 1998. Although the first Complaint was never properly served, Capital One agreed to accept service, and it filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on April 24, 1998. The district court consolidated Burnette's cases and granted Capital One's Motion to Dismiss, with prejudice, on July 20, 1998. It dismissed both Complaints as to both Capital One and Signet Bank. By a *per curiam* opinion, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court on February 3, 1999. Burnette then filed a Petition for Rehearing and Rehearing en Banc, which was denied by Order of March 15, 1999. Burnette appealed to this Court for an extension

of time in which to file her Petition for Certiorari. That extension was granted and Burnette filed her Petition on June 28, 1999.

## ARGUMENT

### I. Burnette's Claims are Barred by the Applicable Statute of Limitations

Burnette's Petition has failed to present the issues in a clear and brief manner, and for that reason, the Court may dismiss the Petition. *See* Sup. Ct. R. 14.4. One fact, however, is abundantly clear and militates in favor of dismissal: Burnette's claims are barred by the applicable statute of limitations. Under 28 U.S.C. § 1658 (1998), an Act of Congress enacted after December 1, 1990 which does not contain a statute of limitations period falls under the "catch-all" limitations period of four years. Contrary to Burnette's assertions, for federal statutes enacted prior to December 1, 1990, courts must "borrow" the most analogous state limitations period. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (noting that borrowing applicable state statutes of limitations in the absence of federal direction is longstanding and settled).

The anti-discrimination provisions of the Bankruptcy Act at issue here were enacted well before December 1, 1990, and they do not contain a limitations period. Therefore, the Court must apply the most closely analogous Virginia limitations period. While Virginia law does not recognize a cause of action for bankruptcy discrimination, wrongful discharge from employment is recognized

in Virginia. State and federal courts applying Virginia law have applied the "catch-all" limitations period found in Va. Code Ann. § 8.01-248 (Michie 1995) to claims for wrongful discharge. *See Sutter v. First Union Nat'l Bank of Va., Inc.*, 1996 U.S. Dist. LEXIS 10985, at *11 (E.D. Va. July 22, 1996) (applying the "catch-all" period to claims for wrongful termination under § 510 of ERISA); *Purcell v. Tidewater Construction Corp.*, 458 S.E.2d 291 (Va. 1995) (applying "catch-all" period to employment claims). Currently, the period prescribed by this section is two years. Under a former version of the statute effective in 1993 and 1994, the limitations period for actions accruing before July 1, 1995 was one year. *See* Va. Code Ann. § 8.01-248 (Michie 1984).

Burnette was denied employment by Signet Bank on November 12, 1993 and again on June 16, 1994. She also claims that Signet had her temporary assignment and position with Kelly Services terminated in the summer of 1994. Her causes of action for bankruptcy discrimination, if they accrued at all, accrued on those dates and by the end of the summer of 1994. Because the four-year statute of limitations found in 28 U.S.C. § 1658 by its own terms does not apply, the one-year limitations period found in the former Va. Code Ann. § 8.01-248 must apply. Therefore, even if Burnette had cognizable claims for failure to hire because of bankruptcy, they expired on November 14, 1994 and June 16, 1995, respectively. Further, if she had a claim for bankruptcy discrimination based on her allegation that Signet had her temporary position with Kelly Services terminated, that cause of action expired during the summer of 1995.

## II. Burnette's Claims are not Cognizable Under 11 U.S.C. § 525(b)

Several district courts have considered whether a cause of action for failure to hire based on bankruptcy status will lie against a private employer, but no circuit other than the Fourth Circuit in this case, has addressed this narrow question. Only the Ninth Circuit has written an opinion examining the broader question of whether an employer-employee relationship is necessary to assert a claim of discrimination against a private employer based on bankruptcy status.

In *Comeaux v. Brown & Williamson Tobacco Co.*, the Ninth Circuit applied section 525(b), without a discussion of its applicability, to a private employer who declined to employ the plaintiff after it had offered, and the plaintiff had accepted the offer of full-time employment. *See Comeaux*, 915 F.2d 1264, 1268-69 (9th Cir. 1990); *see also In re Hopkins*, 81 B. R. 491 (Bankr. W.D. Ark. 1987) (same). The *Comeaux* court concluded summary judgment for the company was appropriate because the bankruptcy was not the sole factor causing the company to renege on its offer of employment. *See Comeaux*, 915 F.2d at 1269.

Consequently, Capital One submits that it is premature for the Court to grant a Writ of Certiorari to settle the issue. Insofar as the Court finds the issue to be ripe for review in this case, Capital One argues that the Court should follow the reasoning of the majority of district courts and conclude that no such cause of action is available to Burnette.

Even if Burnette's claims were timely filed, they must fail because 11 U.S.C. § 525(b) does not provide a cause of

action against a private employer for the failure to hire a person on account of bankruptcy status. Unlike the language contained in 11 U.S.C. § 525(a) which applies to the government, Congress did not include a provision in section 525(b) which proscribes a private employer from "deny[ing] employment to" a bankrupt or debtor. *See* 11 U.S.C. § 525(b). It is a well-accepted tenet of statutory construction that " 'Congress acts intentionally and purposely in the disparate inclusion or exclusion' " of specific statutory language. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Where Congress has left out a statutory phrase, it is the Court's duty to refrain from reading it into the statute. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

The legislative history of 11 U.S.C. § 525(b), is unfortunately sparse and does not address the question at issue in this case. *See* John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 Am. Bankr. L. J. 185, 197 (1986). Several district courts, however, have considered the text of 11 U.S.C. § 525(b) and determined that the correct reading of the statute requires the debtor to stand in an employee-employer relationship with the defendant. *See, e.g., In re Hardy*, 209 B. R. 371 (E.D. Va. 1997). In *Fiorani v. CACI*, 192 B. R. 401 (E.D. Va. 1996), the court specifically considered the effect of the phrase "with respect to employment" in light of the absence of the phrase "deny employment to" in section 525(b). The court concluded that the proper reading of the phase "with respect to employment" is one to cover neither hiring nor firing, but other terms and conditions of employment. If "with respect to employment" were meant to include

hiring and firing it would not have been necessary for Congress to include "termination" in the statute. *See Pastore v. Medford Sav. Bank*, 186 B. R. 553, 554-55 (D. Mass. 1995); *Fiorani*, 192 B. R. at 404-05. The general reference to employment in section 525(b), therefore, is not properly read to include hiring.

An examination of the chronology of congressional action with respect to 11 U.S.C. § 525 fully supports the conclusion that Congress deliberately chose not to prohibit the denial of employment on the basis of bankruptcy. Congress enacted section 525(a) in 1978, and it enacted section 525(b) in 1984. Congress therefore, in enacting section 525(b), was aware of the language contained in the section applicable to government entities and specifically declined to include "deny employment to" in the section applicable to private employers. *See Fiorani*, 192 B. R. at 405. Where Congress omits language in one section but includes it in another section of the same Act, it is presumed to act with a purpose. *See, e.g., Russello*, 464 U.S. at 23; *Middlesex City Sewage Auth. v. Sea Clammers*, 453 U.S. 1, 14-15 (1981). This rule is particularly appropriate when considering a comprehensive statutory scheme such as the Bankruptcy Act. *See, e.g., Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197-98 (6th Cir. 1983) (calling the Bankruptcy Act a "detailed and calculated statutory scheme particularly appropriate for *in pari materia* construction").

Thus, elementary rules of statutory construction and a textual analysis clearly support the conclusion that section 525(b) does not provide a cause of action against a private employer for its failure to hire an applicant who is or has been a bankrupt or a debtor. *See Fiorani*, 192 B. R.

at 405. Additional authority also supports this conclusion. Relying largely on the same textual argument advanced here by Capital One, courts have held that the bankruptcy statute does not impose liability on private employers for refusing to hire persons who have filed for bankruptcy. *See, e.g., Fiorani,* 192 B. R. at 404-05; *Pastore,* 186 B. R. at 554; *In re Madison Madison Int'l of Ill.,* 77 B. R. 678, 680-81 (Bankr. E.D. Wis. 1987).

The cases concluding that liability may be extended where there is no employer-employee relationship may be readily explained away or distinguished. First, the decisions do not address whether the failure to hire a bankrupt or debtor violates section 525(b). Second, in applying section 525(b) to credit unions who did not offer certain loan opportunities to members who were or had been bankrupts or debtors, the decisions rely on a committee statement issued in 1978 with the enactment of section 525(a). *See In re Patterson,* 125 B. R. 40, 53 (Bankr. N.D. Ala. 1990), *aff'd,* 967 F.2d 505 (11th Cir. 1992) (applying section 525(b) to debtor's credit union); *In re Callender,* 99 B. R. 378, 380 (Bankr. S.D. Ohio 1989) (same). These decisions do not provide an explanation as to why a congressional statement with respect to one bill can be properly used to interpret a different provision passed six years later. These decisions, therefore, are not persuasive.

Applying the above analysis, Burnette's first Complaint dated November 17, 1997 does not state a cause of action. Her second Complaint dated June 16, 1998, appears to allege that Signet Bank took steps to have her temporary assignment terminated as a result of its knowledge of Burnette's credit history. At least one court had held that a temporary employee can maintain an action

under 11 U.S.C. § 525(b) against a private employer if she can show the defendant was her real "employer," as evidenced by the defendant's right to control the plaintiff's work. *See Fiorani*, 192 B. R. at 408-09 (citing *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979)). In addition to the right to control, other factors cited by the *Spirides* court are the following:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment; (6) the manner in which the work relationship terminated, i.e. by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

*Id.* at 408-09. The district court below found that Burnette failed to provide any facts which would allow the Court to even consider the factors set out in *Spirides*.

## CONCLUSION

For the foregoing reasons, Capital One Bank and Tom A. Broadhead respectfully request that the Court deny Burnette's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 99-16

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# In The Supreme Court Of The United States

**OCTOBER TERM, 1998**

**RAMONA S. BURNETTE,**

*Petitioner,*

**vs.**

**SIGNET/FIRST UNION NATIONAL BANK and CAPITAL ONE BANK,**

*Respondents.*

***ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT***

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals correctly held that Ms. Burnette's claims of bankruptcy discrimination were time-barred, as they were brought more than one (1) year after the alleged discriminatory acts occurred?

2. Whether 11 U.S.C. § 525(b) applies where no employer-employee relationship exists?

## STATEMENT PURSUANT TO RULE 29.6

Respondent First Union National Bank[1] is a national banking association headquartered in Charlotte, North Carolina. Its parent corporation is First Union Corporation, which is also headquartered in Charlotte, North Carolina. First Union National Bank has no non-wholly owned subsidaries.

[1] Since March 1994, Signet Bank and Capital One have been separate and distinct entities with no affiliation. On or about November 29, 1997, Signet Bank merged with and into First Union National Bank ("First Union"). As a result, Signet Bank is proceeding in this appeal as First Union. To avoid possible confusion, First Union National Bank will continue to be referred to as "Signet" throughout this Brief.

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*Statutory Provisions:*

11 U.S.C. § 525(b)..... *passim*

28 U.S.C. § 1658..... 1, 4

Va. Code § 8.01-248..... 6

## OPINIONS BELOW

The opinion and order of the District Court (Civil Action Number 3:97CV865; Pet. App. 9-16) was filed on July 20, 1998 and is unreported. The opinion of the Court of Appeals (No. 98-2242; Pet. App. 1-2) was entered on February 3, 1999 and is unpublished. A petition for rehearing and rehearing *en banc* was denied on March 15, 1999 (Pet. App. 21). On June 18, 1999, the Chief Justice extended the time to petition for a writ of *certiorari* to June 28, 1999.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are 28 U.S.C. § 1658 and 11 U.S.C. § 525(b).[1]

## STATEMENT OF THE CASE

### A. Introduction

On November 17, 1997 and June 16, 1998, Ramona S. Burnette ("Petitioner" or "Burnette") filed complaints in

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[1] In her petition, Burnette cites numerous constitutional provisions and amendments, as well as 28 U.S.C. §§ 1331, 1334 and 42 U.S.C. § 1983. None of these constitutional or statutory provisions are at issue here.

the United States District Court for the Eastern District of Virginia, Richmond Division ("District Court") against Signet/Capital One Bank. In the first complaint, Burnette alleged that Signet failed to hire her in violation of 11 U.S.C. § 525(b). In her second complaint, Burnette alleged that a "temporary position" she was working at Signet (through an employment agency) was terminated when she "probably was identified by the Human Resources Department" as a "previous applicant."

Finding "substantial similarities" in Burnette's two complaints, the District Court consolidated them by orders of July 8, 1998 (Pet. App. 18-19). By Final Order of July 20, 1998, the District Court granted Capital One Bank's Motion to Dismiss[2] pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("F.R.C.P.") (Pet. App. 9-16).

Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the ruling of the District Court on February 3, 1999 (Pet. App. 1-2). A petition for rehearing and rehearing *en banc* was denied on March 15, 1999 (Pet.

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[2] Signet filed a motion to dismiss based on F.R.C.P. 12(b)(6) on July 20, 1998. At that time, counsel for Signet was unaware of Burnette's November 17, 1997 complaint and the District Court's consolidation orders of July 9, 1998. By order of July 22, 1998, the District Court dismissed Signet's motion as moot, in light of the Court "having resolved the matters presented therein." Nevertheless, both grounds for dismissal cited in this Brief in Opposition were raised previously by Signet in its initial motion to dismiss and were relied upon by the District Court in its decision dismissing Burnette's claims.

App. 21). The petition for a writ of *certiorari* was docketed on June 28, 1999.

**B. Proceedings in the Courts Below**

In his opinion dismissing the Petitioner's claims, Judge James R. Spencer held that (1) 11 U.S.C. § 525(b) did not apply to Burnette or "the facts of this case" and (2) Burnette's claims were barred by the applicable statute of limitations. Specifically, the District Court cited In re Hardy, 209 B.R. 371 (E.D. Va. 1997), wherein "the Bankruptcy Court examined the legislative history of [11 U.S.C. § 525(b)] and found that the correct reading requires the debtor be an employee of the employer-defendant." Moreover, the District Court noted that "[p]reviously, this Court articulated the same principle. See Fiorani v. C.ACI, 192 B.R. 401, 408 (E.D. Va. 1996) (dismissing claim for discrimination in hiring because it did not allege termination of employment or discrimination with respect to employment under 11 U.S.C. § 525(b))." (Pet. App. 13).

In a per curium opinion, the Fourth Circuit Court of Appeals affirmed the decision of the District Court (Pet. App. 1-2).

## REASONS FOR DENYING THE WRIT

There is no split in authority among the circuits with respect to the applicable limitations period for Burnette to have brought her claims. Consonant with the other decisions considering the question, the court of appeals

correctly affirmed the District Court's holding that, since 11 U.S.C. § 525(b) contains no express limitations period and was enacted prior to December 1, 1990, a court will look to closely analogous state statutes for the applicable limitations period (Pet. App. 15). There is simply no "compelling reason" for *certiorari* under this Court's criteria as set forth in Rule 10.

In addition, the District Court correctly held that, even if Burnette's claims were timely, she nevertheless failed to allege sufficient facts to establish the requisite employment relationship between herself and the respondent. Consequently, 11 U.S.C. § 525(b) does not apply here. [3]

## I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICABLE LIMITATIONS PERIOD

11 U.S C. § 525(b), which was enacted prior to December 1, 1990,[4] contains no express limitations period. "In the absence of an explicit limitations period in a federal statute, courts presume that Congress intended by its silence to borrow a limitations period from the most

[3] While the Fourth Circuit Court of Appeals, in its per curium decision, appears to have affirmed the District Court's dismissal of Burnette's claims based only on timeliness, this second ground for dismissal was argued in Respondent's Motion to Dismiss and was relied upon by the District Court in its decision to dismiss Petitioner's claims.

[4] Pursuant to 28 U.S.C. § 1658, federal statutes enacted after December 1, 1990 that do not contain an express statute of limitations have a four-year limitations period.

analogous state law cause of action." Kinder v. Coleman & Yates Coal Co., 974 F.Supp. 868, 872 (W.D.Va. 1997) (citing Reed v. United Trans. Union, 488 U.S. 319, 323-24, 102 L.Ed.2d 665, 109 S.Ct. 621 (1989); see also, North Star Steel Co. v. Thomas, 515 U.S. 29, 33-34, 132 L.Ed.2d 27, 115 S.Ct. 1927 (1995)). In North Star Steel, Justice Souter noted that "[a] look at his Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims." North Star Steel v. Thomas, 515 U.S. at 33 (internal citations omitted). In short, "[s]ince 1830, 'state statutes have repeatedly supplied the periods of limitations for federal causes of actions' when the federal legislation makes no provision." Id. at 34 (quoting Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-704, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966)).[5]

In Virginia, there is no state law equivalent to 11 U.S.C. § 525(b). However, Virginia law does recognize the tort of wrongful discharge, which is generally subject to the present two-year "catch-all" limitations period of Va. Code § 8.01-248. See, e.g. Michael v. Sentara Health System, 939 F.Supp. 1220 (E.D. Va. 1996) (one year

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[5] A "closely circumscribed" and "narrow" exception to the general rule exists when the state limitations period would "frustrate or interfere with the implementation of national policies" or would be "at odds with the purpose or operation of federal substantive law." North Star Steel v. Thomas, 515 U.S. at 34 (internal citation omitted). However, petitioner does not argue, nor does the record suggest that Virginia's limitations period somehow "stymie[s] the policies underlying the federal cause of action." Id.

statute of limitations applies to wrongful discharge claims);[6] Purcell v. Tidewater Construction Corp., 250 Va. 93, 458 S.E.2d 291 (1995) (applying "catch-all" limitations period to state law wrongful discharge claims).

"Under Virginia law, a cause of action accrues on the date that the party has a right to bring the asserted action." Purcell v. Tidewater Constr. Corp., 34 Va. Cir. 91, 92 (1994), aff'd 250 Va. 93, 458 S.E.2d 291 (1995) (citing Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheetmetal, Inc., 221 Va. 81, 266 S.E.2d 887 (1980)). Insofar as Burnette alleges that she was denied employment in 1993 and 1994, her claims fall under the earlier version of the "catch-all" statute. As a result, the District Court was correct in dismissing both of her complaints as time-barred, because neither was filed within one year after the accrual of her alleged causes of action.

## II. 11 U.S.C. § 525(b) IS INAPPLICABLE AS NO EMPLOYMENT RELATIONSHIP EXISTED BETWEEN PETITIONER AND RESPONDENT

The District Court correctly held that, even if Burnette's claims were timely, she nevertheless has failed to allege sufficient facts to establish the requisite employment relationship between herself and the respondent. Consequently, 11 U.S.C. § 525(b) does not apply.

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[6] Causes of action arising prior to July 1, 1995 are subject to the one-year limitations period. Va. Code § 8.01-248 (1992).

11 U. S.C. § 525(b) states in pertinent part:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title [or] a debtor under the Bankruptcy Act ... solely because such debtor or bankrupt ... is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act.

While this language clearly covers terminations, alleged discrimination in hiring is not encompassed in the statute. Fiorani v. CACI, supra, is on point. In Fiorani, the Court held that 11 U.S.C. § 525(b) does not apply to hiring decisions for several reasons. First, the Court noted that the statutory language makes no reference to hiring, and to read the phrase "discriminate with respect to employment" to include hiring decisions:

> seems to stretch the statute too far, for if the reference to discrimination "with respect to employment" is read to cover hiring, it would for the same reasons, seem that the phrase was also meant to reach termination. But it is quite apparent that this is not so, given the statute's framers found it necessary to make separate, explicit reference to termination.

Fiorani, 192 B.R. at 405 (E.D. Va. 1996); see also Madison Madison Int'l, P.C. v. Matra (In re Madison Madison Int'l, P.C.), 77 B.R. 678 (E.D. Wis. 1987).

Second, the Court found an even "more compelling clue" when it compared 11 U.S.C. § 525(b) to § 525(a), which was enacted some six years earlier. "Subsection (a), which applies only to governmental units, states that a governmental unit may not '*deny employment to,* terminate the employment of, or discriminate with respect to employment against" a debtor or bankrupt." Id. (emphasis original). Consequently, while section (a) specifically includes hiring in the statutory language, section (b) does not. "This is compelling evidence that § 525(b) does not reach hiring, for it is well-established that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposefully in the disparate inclusion or exclusion." Id. (internal citations omitted). See also In re Hardy, 209 Bankr. 371 (E.D. Va. 1996); Pastore v. Medford Sav. Bank, 186 Bankr. 553 (D. Mass. 1995).

In her complaint of June 16, 1998, Burnette appears to claim that she was an employee of Signet by virtue of her relationship with Kelly Services, a temporary employment agency. However, she failed to plead any facts by which the District Court could have concluded that she somehow was "controlled" by Signet. Such "control" remains the primary factor for determining whether an employer-employee relationship exists. Fiorani, 192 Bankr. at 409. Nevertheless, Burnette also failed to allege facts that would have allowed the District Court to determine whether she met the other relevant Spirides factors, such as the kind of occupation in question, the skill required to perform such occupation, whether the "employer" or the individual furnished the

equipment used and the place of work, the length of time the individual had worked, and so on. Id. (*citing* Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979)).

Finding, that Burnette had failed to plead facts by which it could consider even "the most basic of the Spirides factors, namely, Signet/Capital One's right to control the means and manner of her work performance," the District Court properly dismissed Burnette's complaints. See also Garrett v. Phillips Mills, 721 F.2d 979 (4th Cir. 1983) (adopting the factors listed in Spirides).

## III. PETITIONER RAISES NO NEW ISSUES FROM HER PREVIOUS APPEAL

In her petition, Burnette does little to demonstrate that the court of appeals erred in affirming the decision of the District Court. Regarding the limitation issue, the Petitioner states that "FEDERAL COURTS DO NOT ADOPT STATE STATUTES OF LIMITATIONS IN CASES INVOLVING FEDERAL QUESTION." (Pet. App. 13, 16) (emphasis original). The lone cite provided by the Petitioner in support of this assertion is Alession v. Adkins, 102 B.R. 485 (E.D. Va. 1989).

The Alession case does not help the Petitioner. First, it is not on point, as it does not involve 11 U.S.C . § 525(b). Second, Alession does not hold that a federal court will not apply a state statute of limitations. Quite the contrary, the court in Alession specifically looked to Virginia's statute of limitations regarding the enforcement of written contracts to determine whether the plaintiff's

collection efforts were timely. Id. at 488. Put simply, the Alession case does not stand for the proposition advanced by the Burnette.

As for the second issue, the Petitioner fails to cite any authority to support her argument that 11 U.S.C. § 525(b) applies in the absence of an employer-employee relationship.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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